

**U.S. Department of Labor**

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**Issue Date: 10 January 2003**

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In the Matter Of:

DANIEL S. SOMERSON  
Complainant

Case No. 2003-STA-00011

v.

MAIL CONTRACTORS OF AMERICA,  
FRIDAY, ELDREDGE & CLARK and  
OSCAR DAVIS  
Respondents  
.....

**RECOMMENDED DECISION AND ORDER DISMISSING COMPLAINT AND  
REFERRING MATTER TO THE TENNESSEE SUPREME COURT'S BOARD  
OF PROFESSIONAL RESPONSIBILITY**

Respondents, Mail Contractors of America, Attorney Oscar Davis, and the Law Firm of Friday, Eldridge and Clark move to dismiss the above captioned complaint filed against them under the Surface Transportation Assistance Act, 49 U.S.C. § 31105 (STAA).

The motion to dismiss asserts that the complaint should be dismissed because it fails to assert a *prima facie* allegation of an adverse employment action, but rather complains of a motion filed during a hearing before Administrative Law Judge Edward Terhune Miller at Case No. 2002-STA-44, and that it should be dismissed against Respondents Oscar Davis and the law firm of Friday, Eldridge & Clark because they do not constitute either separately or jointly an employer engaged in business affecting commerce that owns or leases a commercial motor vehicle in connection with that business as defined in 49 U.S.C. § 31101(3)(A) and thus are not persons within the ambit of the STAA. Complainant, Daniel Somerson, has filed a response to the motion to dismiss.

The complaint asserts that the Respondents acted contrary to the employee protection provisions of the STAA by filing before Judge Miller at Case No. 2002-STA-44 "filings" intended to "induce" Judge Miller to dismiss a whistleblower complaint previous filed by Complainant against Mail Contractors of America Inc. Oscar Davis is the attorney and Friday, Eldredge and Clark is the law firm representing Mail Contractors of America Inc. in the proceeding before Judge Miller. The document referred to as "filings" that Complainant contends constitutes an adverse employment action is a motion filed before Judge Miller by Mail Contractors of America

Inc. seeking a Protective Order And Witness Interview Restriction. The motion for protective order asserts that the Complainant, Daniel Somerson, transmitted anonymous, implicitly threatening, e-mails to persons named as witnesses in the proceeding before Judge Miller and established anonymous web sites directed at counsel for Mail Contractors of America Inc. which contain vulgar, abusive and implicitly threatening messages. The motion sought a protective order against the abusive e-mails and websites, and requested restrictions on Complainant's contact with prospective witnesses.

In Case No. 2002-STA-44, after considering Mail Contractors of America's motion for protective order, and its supporting documentation, as well as the response thereto filed by Complainant's attorney, Edward A. Slavin, Jr., Judge Miller found that the Complainant had engaged in such an "extreme manifestation of misconduct," that is, the intimidation of witnesses and opposing counsel, that he dismissed the claim outright, and certified the facts to the U.S. District Court with a request for appropriate remedy. *Somerson v. Mail Contractors of America, Inc.*, 2002-STA-44 (ALJ, Dec. 16, 2002)

The present complaint, asserting that the motion for protective order is an adverse employment action under the STAA, is completely specious. The complaint fails to allege the essential elements of a violation of the whistleblower protection provisions of the STAA. To prevail under the STAA, it is necessary to prove that the Complainant was an employee of a covered employer, the complainant engaged in protected activity, the Complainant thereafter was subject to adverse action regarding his employment, Respondents knew of the adverse activity when it took the adverse activity, and the protected activity was the reason for the adverse action. First, the motion for protective order filed by Mail Contractors of America, considered and granted by Judge Miller, is not an adverse employment action in retaliation for protected activity under the STAA. Judge Miller found that the "*ad hominem* communications" which were to be prohibited by the protective order "have nothing to do with safety or fatigue as it applies to truckers, or indeed anything except implicit threats, and scurrilous insults in the nature of harassment, [and] are not protected activity in issue under the STAA." *Recommended Decision and Order Dismissing Complaint And Certifying Facts Relating To Intimidation And Harassment Of Witnesses And Counsel To Federal District Court*, at. 4, fn. 3. (Slip opinion attached hereto). Second, the attorneys representing Mail Contractors of America before Judge Miller are not Complainant's employers under the STAA. *See Saporito v. Florida Power & Light Co.*, 1994-ERA-35 (ARB July 19, 1996). To be considered an employer under the STAA the attorneys would have to be employers operating a commercial motor carrier. 49 U.S.C. § 31101(3)(A), 29 C.F.R. § 1978.100 *et seq.*

In actuality, the complaint is a carry over of the attacks by Complainant and attorney Slavin on Mail Contractors of America's attorneys and witnesses that occurred in the proceeding before Judge Miller. Its sole purpose is the intimidation and harassment of counsel representing Mail Contractors of America, as illustrated by the fact that Attorney Slavin attached the whistleblower complaint filed here to a motion to vacate Show Cause Order he filed in the proceeding before Judge Miller. Judge Miller characterized the purpose of the complaint: "The

new complaint against counsel, as well as Respondent, which is not directly relevant to the pending complaint, has the obvious attributes of continuing harassment of counsel.”  
*Recommended Decision and Order Dismissing Complaint And Certifying Facts Relating To Intimidation And Harassment Of Witnesses And Counsel To Federal District Court*, at 3, fn. 2.

Attorney Slavin’s response to Respondents’ motion to dismiss fails to address the arguments therein, a clear indication that he does not believe that there is any merit to the complaint. Rather, he sets forth a vicious attack on Mail Contractors of America’s attorneys, an attack completely irrelevant to any issue here. He attacks the Respondents as bigots:

Like the “students” who attacked African-Americans at “Ole Miss” and sought to bar them from membership in campus organizations on the basis of epidermal pigmentation, these bigoted Respondents are victimizers who attempt to portray themselves as if they were victims.

The tactics used here by attorney Slavin suggest that he is more than a bystander to his client’s attacks on counsel, and to the intimidation and harassment of witnesses in the proceeding before Judge Miller. His approach to Respondents’ motion to dismiss in this case is to launch a personal attack on Respondents, while failing to address the arguments in the motion. That strategy is identical to his

response to the motion for protective order in Judge Miller’s proceeding. Upon receiving the motion for protective order, Judge Miller issued an Order requiring Complainant to show cause why his complaint should not be dismissed with prejudice because of the misconduct Mail Contractors of America alleged in its motion, and further why the facts of harassment and intimidation of the witnesses and counsel should not be certified to the U.S. District Court, Middle District of Florida, Jacksonville Division. The concerns of the Order To Show Cause were most serious as they addressed e-mail communications of a threatening nature to potential witnesses and e-mail and website characterizations directed at Mail Contractors of America’s counsel that Judge Miller characterized as provocative, vulgar, and egregiously abusive. Nevertheless, Attorney Slavin’s response ignored those concerns. Rather, the response was “unfocused, inchoate, and verbose allegations referring to First Amendment rights” constituting “a defiant declaration that Complainant will not conform his behavior to reasonable or generally acceptable norms or cooperate with this tribunal in the orderly conduct of the hearing...”<sup>1</sup>

This continuum of attacks, intimidation and harassment under the guise of representing a client constitutes an abuse of the administrative process. It wastes this Office’s time and the valuable time of OSHA investigators. It perverts the use of an employee protection statute, the

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<sup>1</sup>*Recommended Decision and Order Dismissing Complaint And Certifying Facts Relating To Intimidation And Harassment Of Witnesses And Counsel To Federal District Court*, at 4.

STAA. It violates an attorney's rules of professional responsibility<sup>2</sup>, and constitutes a breach of the duty that an attorney owes his client. Attorney Slavin's representation of his client at Case No. 2002-STA-44 has contributed to the dismissal of his client's case, and the certification of his client's conduct to the U.S. District Court for appropriate sanctions.

## ORDER

In consideration of the aforesaid, it is hereby Ordered that:

1) This complaint is dismissed for failure to assert a *prima facie* allegation of adverse action on the part of the Respondents as it instead complains of a motion for protective order that was considered and granted during a hearing before Judge Miller at Case No. 2002-STA-44.

2) This complaint is dismissed against Respondents Oscar Davis and the law firm of Friday, Eldredge & Clark as they do not constitute either separately or jointly an employer engaged in business affecting commerce that owns or leases a commercial motor vehicle in connection with that business as defined in 49 U.S.C. § 31101(3)(A) and thus are not persons within the ambit of the STAA.

3) Attorney Slavin's conduct here and at Case No. 2002-STA-44 will be referred to the Tennessee Supreme Court's Board of Professional Responsibility for the Board's consideration of whether his conduct violates its Code of Professional Responsibility. Specifically,

a) whether attorney Slavin aided and abetted his client in intimidating, threatening and harassing Mail Contractors of America Inc.'s witnesses and attorney and therefore violated Rule DR7-102(A)(7)<sup>3</sup> which prohibits an attorney from encouraging or aiding a client in conduct that the attorney knows to be illegal or

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<sup>2</sup>See *Thomas v. Tenneco Packaging Co. Inc.*, 293 F.3d, 1306, 1328 (11<sup>th</sup> Circuit 2002), where the Court sanctioned the attorney because the pleadings filed by him with the court contained remarks that served no other purpose than to "harass and intimidate opposing counsel," and even though the attorney defended himself by saying that the affidavits he filed were actually statements of his client and not his own. The court held that, "at best [the attorney] silently acquiesced to litigation tactics that flew in the face of baseline professional norms."

<sup>3</sup>As found by Judge Miller in Case No. 2002-STA-44, one e-mail of a threatening nature was sent to a prospective witness, Eli Gray. Two e-mails, one of which had a threatening tone, and the other of which was egregiously abusive, were sent to the witness Lary Cole...The remaining samples reflect extremely abusive, hostile, and often vulgar insults directed at Respondent's counsel. *Recommended Decision and Order* supra, at. 6.

fraudulent;<sup>4</sup> and

b) whether his conduct toward the Respondent and opposing counsel, including the filing of the present complaint, violates Rule DR 7-102(A)(1) which precludes an attorney from filing a suit, taking a position, conducting a defense, delaying a trial, or taking some other action on behalf of the client when the lawyer knows or when it is obvious that such action would merely serve to harass or maliciously injure another; and

c) whether his conduct in these cases violates Rule DR 7-102(A)(2) by knowingly advancing a claim that is unwarranted under existing law; and

d) whether his conduct, which Judge Miller characterized as “impertinent assertions and intemperate characterizations that go beyond appropriate zeal and vigor, and are distasteful to the dignity of this tribunal, burdensome and a waste of this tribunal’s time,” violates Rule DR 7-106(B)(6) which precludes an attorney from engaging in undignified or discourteous conduct which is degrading to a tribunal; and

e) whether his conduct in these cases violates Rule EC 7-15 which provides that a lawyer appearing before an administrative agency has a continuing duty to advance the cause of the client within the bounds of the law.

**A**  
THOMAS M. BURKE  
Associate Chief Judge

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<sup>4</sup>Attempts to intimidate a witness or other person in any proceeding before any department or agency of the United States is a criminal offense. 18 U.S.C. § 1512.